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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT DONNELL JONES,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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September 11, 1997

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QUESTION PRESENTED FOR REVIEW

WAS MR. JONES' GUILTY PLEA INVOLUNTARY UNDER STATE AND FEDERAL CONSTITUTIONS BECAUSE THE RECORD SHOWS THAT BECAUSE HE WAS UNDER THE INFLUENCE OF HEROIN WHEN HE ENTERED THE PLEA, HE COULD NOT VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHTS?

PARTIES TO THE PROCEEDING

Petitioner:	Robert Donnell Jones
Respondent:	State of Maryland

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Petitioner, Robert Donnell Jones, respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland entered in this case on March 26, 1997, which affirmed the decision of the Circuit Court of Maryland for Baltimore City denying Mr. Jones' petition for writ of error *coram nobis*.

OPINIONS BELOW

The published opinion of the Court of Special Appeals of

Maryland, for which review is sought is *Jones v. State*, (cite) (1997). The slip opinion in Case No. 585 was dated March 26, 1997 [Appendix C, pp. 4a-11a]. An appeal to that court was taken by Petitioner on April 9, 1997, in the Court of Appeals of Maryland which declined review. [Appendix B, pp. 3a]

JURISDICTION

Jurisdiction of this court is conferred in this case pursuant to 28 U.S.C. §1257(a). The Court of Special Appeals affirmed the denial of Mr. Jones' petition for writ of error *coram nobis* by the Circuit Court for Baltimore City on March 26, 1997; and the judgment of the Court of Appeals of Maryland declining review of the judgment of the Court of Special Appeals was entered on June 11, 1997.

PERTINENT CONSTITUTIONAL PROVISIONS

The questions presented in this case are legal issues concerning the voluntariness of petitioner's guilty plea which has been obtained in violation of petitioner's Fifth Amendment right against self-incrimination, Sixth Amendment right to testify and right to confront the witnesses against him and the due process clause of the Fifth and Fourteenth Amendments as to which this Court possesses a plenary power of review. Set forth in Appendix A, pp. 1a-2a, are U.S. Consti. Amendment V, VI and XIV.

STATEMENT OF THE CASE

Mr. Jones pled guilty to one count of assault with intent to murder on July 16, 1975, before Judge Basil A. Thomas in the Criminal Court of Baltimore and was sentenced on July 31, 1975, to five (5) years to the Department of Corrections. This sentence has expired. Petitioner's federal claims were asserted based upon violations of his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution.

A. Evidence Supporting the Involuntariness of the 1975 Plea

At the *coram nobis* hearing before Judge Joseph McCurdy of the Circuit Court of Maryland for Baltimore City, Petitioner presented testimony of four witnesses as well as the presentence investigation (PSI) prepared for sentencing by probation officer John J. Ralston to show that his 1975 plea was involuntary because he was not able to intelligently and knowingly waive his rights.

Thomas Merrick, the victim in the case in which Mr. Jones had pled guilty to assault with intent to murder, testified that he was a street heroin dealer who sold heroin to support his own habit; that he was Mr. Jones' friend and daily heroin supplier; that because he and Mr. Jones were friends, he was well acquainted with the nature and extent of Mr. Jones' heroin addiction; that Mr. Jones was physically and psychologically addicted to heroin; that at the time of the alleged offense Mr. Jones was a heroin addict who used from seven to thirteen bags of heroin per day; that Mr. Jones had been addicted to

this amount of heroin for quite some time; that at the time of the alleged assault with intent to murder, Mr. Jones had either refused or had been unable to pay the money he owed Mr. Merrick for previously supplying him with heroin; that as a result of Mr. Jones' non-payment, Mr. Merrick severely beat Mr. Jones with a stick; and that the alleged assault with intent to murder took place later in the day.

Richard H. Lane, the prestigious director of Man Alive, a prominent and highly regarded drug treatment program in Baltimore City, was qualified as an expert on how addicts under the influence of heroin relate to others. He testified that based on his dealings with literally thousands of heroin addicts and his successful battle against his own heroin addiction, it was common for heroin addicts to mask their symptoms even when high to conceal their addiction from others; that he had seen defendants plead guilty in court while high under the influence of heroin without detection by the court or the prosecutor, that he had himself done this, that because of the effects of heroin, heroin addicts exhibit poor judgment while under the influence of heroin. However, despite his extensive experience and work with heroin addicts and his own successful battle with a long period of heroin addiction, Judge McCurdy would not permit him to render an opinion that heroin addicts while psychologically and physically addicted to heroin to the extent of Mr. Jones' addiction, could not understand or validly waive the numerous rights involved in a guilty plea litany. Notwithstanding Mr. Jones' proffer that

Mr. Lane had a vantage point superior to that of any psychiatrist and would have rendered an opinion that a heroin addict who was addicted to Mr. Jones' extent and who had injected as much heroin as Mr. Jones had injected on the morning of his guilty plea could not understand or validly waive the numerous rights involved in a guilty plea litany, Judge McCurdy ruled that only a psychiatrist expert in the field of drug addiction could so testify.

In response to Judge McCurdy's refusal to permit such expert testimony from Mr. Lane, Mr. Jones called Patricia A. Newton, M.D., M.P.H., M.A., a psychiatrist who was qualified as an expert in treating heroin addiction and in understanding the physiological and psychological impact of the use of heroin on cognitive functioning, as an expert. Dr. Newton, who had been Chief of Psychiatry at Provident Hospital and who had treated petitioner for his heroin addiction in the 1980's, testified that if petitioner were under the influence of heroin at the time he pled guilty, he would not have been able to enter a voluntary and knowing guilty plea because his cognitive ability would at best be minimal. Dr. Newton further testified that by giving short answers to leading questions, addicts are able to conceal their symptoms of heroin addiction and intoxication from those who are inexpert in detecting the symptoms.

Petitioner testified that at the time of his guilty plea, he was psychologically and physically addicted to heroin; that at the time of the alleged offense he regularly used from seven to

thirteen bags of heroin per day; that he had been addicted to this amount of heroin for quite some time; that when he arrived at court on the day of his guilty plea, he was already under the influence of heroin; that believing that he was going to jail later that day, he had used heroin that morning to ward off excruciatingly painful withdrawal symptoms and because he would not be able to continue regularly to use heroin while in jail; that during a brief delay before his guilty plea, he went to the courthouse men's room to inject himself again with heroin; that he injected himself approximately fifteen to twenty minutes before pleading guilty; that he was intoxicated from this injection when he pled guilty, that he attempted to conceal his intoxication from the court and counsel by feigning sleepiness, and that because of his intoxication, he did not understand or validly waive the numerous rights involved in his guilty plea.

Indeed, Probation Agent John J. Ralston, who was present at the time petitioner's guilty plea was entered, wrote in his presentence report that he observed that petitioner was under the influence of drugs when he entered his plea of guilty and that immediately after the plea that morning, Mr. Ralston interviewed petitioner, had his urine tested, and the test results were positive for opiates. In his presentence report, Mr. Ralston said:

> [Defendant] states he occasionally consumes wine and beer, but never to any great extent. He admits to a drug history dating from 1970 in which he has used

heroin, barbiturates, L.S.D., marijuana, and cough syrup.

The defendant claims he's been spitting up blood for the past several weeks, but does not know what is causing this. Mrs. Jones told this Agent her son has an appointment at the West Baltimore Community Health Care Clinic on August 1, 1975 to attempt to determine his physical ailment.

The defendant has a rather serious heroin addiction dating back about 5 years. *He was "high" when he was in Court for his trial and when he accompanied me over to my office for the initial interview of this investigation. A urinalysis sample was requested and given at that time by Mr. Jones. The result was an opiate positive after testing by the C.R.A.T. Laboratory.*

* * *

Mr. Jones impressed this Agent as a man who is physically and psychologically dependent on heroin. He can not even do without drugs long enough to make a sober appearance in Court! He then attempted to lie about his condition by saying he was "drowsy" because he had taken some Tylenol that morning. He is a man who obviously possesses little self-control and whose self-concept may have deteriorated from prolonged abuse of heroin.
(emphasis added)

Agent Ralston was not called to testify after Judge McCurdy indicated that he would accept his probation report as being true in lieu of his testimony. Notwithstanding the inherent liability of this evidence, Judge McCurdy denied the petition on March 3, 1994 [Appendix D, pp. 14a-18a].

B. Decision of the Court of Special Appeals of Maryland

Following the denial of Mr. Jones' petition by Judge McCurdy, petitioner filed a timely appeal to the Court of

Special Appeals of Maryland on April 1, 1994, and properly sent a copy of his notice to the State. However, although the prosecutor received a timely appeal, the clerk's office had no record of the filing. Two years later, petitioner made a motion to the Circuit Court of Baltimore City to grant a belated appeal and by order, dated January 16, 1996, Judge McCurdy "ORDERED that a belated appeal be granted in this case; and that beginning the date of this order, Petitioner has 30 days to file said appeal." Accordingly, Petitioner's Notice of Appeal was filed January 17, 1996. Both parties properly filed their briefs in the Court of Special Appeals where the State's contention that the lower court did not have the authority to grant the belated appeal was rejected and the judgment of the Circuit Court for Baltimore City (Joseph McCurdy, Judge) in denying the 1993 petition for writ of error *coram nobis* was affirmed (a copy of the Opinion is attached as Appendix C).

Petitioner filed a Petition for Writ of Certiorari seeking review by the Court of Appeals of Maryland and on June 11, 1997, the Court of Appeals issued an Order denying further review.

C. Stage of Proceedings Where Federal Questions Raised

1. On October 15, 1992, before the Circuit Court of Maryland for Baltimore City, petitioner first asserted his Fifth, Sixth and Fourteenth Amendment claims in his original petition for writ of error *coram nobis* to vacate the 1975 conviction. In that petition, Mr. Jones first challenged the

voluntariness of his 1975 guilty plea and alleged that he was denied his state and federal constitutional rights to be properly advised before the acceptance of a guilty plea. Judge Edward J. Angeletti summarily denied that petition without a hearing.

2. On November 4, 1993, before the Circuit Court of Maryland for Baltimore City, Petitioner again asserted the same claims in a second petition for writ of error *coram nobis* to vacate the 1975 conviction; and after hearings were held on December 20, 1993, and February 14, 15, 16, and 17, 1994, before Judge Joseph P. McCurdy in the Circuit Court for Baltimore City, Judge McCurdy denied the petition on March 3, 1994.

3. From this judgment. Mr. Jones filed a timely appeal to the Court of Special Appeals of Maryland on April 1, 1994, and properly sent a copy of his notice to the State. However, although the prosecutor received a timely appeal, the clerk's office had no record of the filing. Two years later, petitioner made a motion to the Circuit Court of Baltimore City to grant a belated appeal and by order, dated January 16, 1996, Judge McCurdy "ORDERED that a belated appeal be granted in this case; and that beginning the date of this order, Petitioner has 30 days to file said appeal." Accordingly, Petitioner's Notice of Appeal was filed January 17, 1996.

4. Before the Court of Special Appeals, Petitioner pursued his claim against the State by presenting the following issues:

> I. Was Mr. Jones' guilty plea involuntary under the State and federal constitutions, the laws of Maryland

> and the Rules because the record shows that because he was under the influence of heroin when he entered the plea, he could not voluntarily, knowingly and intelligently waive his rights?
>
> II. Is this appeal barred by Article 27, Section 645A(e) and did Judge McCurdy have the power under the law of coram nobis to grant a belated appeal from his denial of Mr. Jones' petition for writ of error *coram nobis*?

The State's contention that the lower court did not have the authority to grant the belated appeal was rejected and the judgment of the Circuit Court for Baltimore City (Joseph McCurdy, Judge) in denying the 1993 petition for writ of error *coram nobis* was affirmed.

5. Before the Court of Appeals of Maryland, Petitioner pursued his claim against the State by presenting the following issue:

> Mr. Jones's guilty plea was involuntary under the State and federal constitutions, the laws of Maryland and the Rules because the record shows that he was under the influence of heroin when he entered the plea.

The Court of Appeals declined review of the issue.

REASON FOR GRANTING THE PETITION

MR. JONES' GUILTY PLEA WAS INVOLUNTARY UNDER STATE AND FEDERAL CONSTITUTIONS BECAUSE THE RECORD SHOWS THAT BECAUSE HE WAS UNDER THE INFLUENCE OF HEROIN WHEN HE ENTERED THE PLEA, HE COULD NOT VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHTS.

The safeguards of fundamental fairness entitle Mr. Jones to vacate his guilty plea through a writ of error *coram nobis* since he has demonstrated that his mental faculties were so impaired by drugs when he entered his plea that he was incapable of a full understanding and an appreciation of the charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea.

Writs of error *coram nobis* developed at common law and have been used in modern practice to right a judicial wrong where no other remedy is available. The historical background of the writ is summarized in 38 ALR Fed. 617:

> To relieve litigants from judicial wrongs for which there was no remedy, writs of error coram nobis . . . were developed at common law as early as the sixteenth century . . . .During the seventeenth and eighteenth centuries such writs received scant attention but appear to have been revived by the mid nineteenth century in both state and federal jurisdictions in the United States . . . . In relatively recent years . . . as evidenced by the many case citations . . . and as noted by legal commentators, there has been a rapid

> expansion or widespread revival of the use of the writ of coram nobis in criminal cases.

38 ALR Fed at 622. Now it is clear that:

> The writ of error coram nobis is available to a convicted criminal at any time following the entry of judgment against him or her. A writ of error coram nobis may be sought where, as here, the challenged sentence has been completely served.

Flippins v. United States, 747 F.2d 1089, 1091 (6th Cir. 1984).

As this Court has said, "continuation of litigation after final judgment and exhaustion . . . of any statutory right of review" is allowed "to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511, 74 S.Ct. 247, 252 (1954). In the recent case of *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), Judge Friendly, speaking for a unanimous court, issued a writ of error *coram nobis* vacating mail fraud convictions entered against a defendant after his sentence, including parole and probation, had expired. [Judge Friendly was eulogized in 99 Harv. L. Rev. 1709 (1986) and in 806 F.2d as a legal scholar. His reputation as a judge is virtually unparalleled.] Indeed, *Travers* is hardly an aberration. Relief by coram nobis in a proper case is a well recognized judicial prerogative. *See, e.g., United States v. Loschiavo*, 531 F.2d 659, 652 (2d Cir. 1976); *Mathis v. United States*, 369 F.2d 43, 49 (4th Cir. 1966); and *Hirabayeshi v. United States*, 627 F.Supp. 1445 (W.D. Wash. 1986).

Likewise, the courts of the state of Maryland have recognized the common law writ of error *coram nobis*. On August 20, 1993, the Court of Appeals of Maryland ruled that constitutionally infirm convictions where sentences have expired may be set aside by writ of error *coram nobis*. *Fairbanks v. State*, 331 Md. 482, 629 A.2d 63 (1993). In *Fairbanks*, the Court of Appeals said:

> [T]here exists a statutory procedure for the orderly bringing of a collateral challenge against prior convictions resulting in continued confinement, parole, or probation. Maryland Uniform Post Conviction Procedure Act, Md. Code (1957, 1992 Repl. Vol.) Art. 27, Sections 645A through 645J, with supplementary rules of procedure, Maryland Rules 4-401 through 4-408. Common law actions, including the writ of error *coram nobis*, may be available for collateral attacks on prior convictions that no longer impose restraints on a defendant. Article 27, Section 645A; Gluckstern v. Sutton, 319 Md. 634, 662, 574 A.2d 898, cert. denied, 498 U.S. 950 (1990); Brady v. State, 222 Md. 442, 447, 160 A.2d 912 (1960). Cf. United States v. Morgan, 346 U.S. 502, 511, 74 S.Ct. 247, 98 L.Ed. 248 (1954); U.S. v. Canales, 960 F.2d 1311, 1316 (5th Cir. 1992).
>
> * * *
>
> A defendant who is prevented from challenging the constitutionality of a prior conviction at trial or during a sentencing proceeding is not thereby divested of an opportunity for relief. That defendant may thereafter mount a collateral challenge by any means that remain available, including post-conviction procedures, habeas corpus, error *coram nobis*, or other statutory or common law remedies. If successful, the defendant may possibly then challenge the conviction or sentence affected by the use of the constitutionality infirm conviction. (Slip opinion at 3, 11)

Apropos of this case, the Court of Appeals said in *Fairbanks* that:

> The spectrum of challenges that might be made is necessarily broad; constitutionally based challenges range from obvious and direct infirmities, such as denial of the right to counsel, to more general concepts. Thus, in addition to denial of right to counsel claims, we can expect to see constitutionally based challenges mounted on grounds of denial of effective representation by counsel, denial of right to jury trial, coerced confession, double jeopardy, self incrimination, uninformed or involuntary guilty plea, lack of due process, and the like. A single challenge to a prior conviction may involve multiple claims of constitutional infirmity. See, e.g., U.S. v. Custis, 988 F.2d 1355, 1358 (4th Cir. 1993) (involving claims of ineffective assistance of counsel, uninformed guilty plea, and violation of due process, with respect to a single predicate conviction).

In the instant case, during the petitioner's hearing for his petition for writ of error *coram nobis* relief, the trial court erroneously concluded that "petitioner has not affirmatively proven that he was intoxicated at the time of his plea."

During the hearing, the trial court stated that it would accept Agent Ralston's essentially self-verifying report as true in lieu of his live testimony and Agent Ralston contemporaneously observed that "[Mr. Jones] was 'high' when he was in Court for his trial and when he accompanied me over to my office for the initial interview of this investigation." The lower court's erroneous conclusion was based on the arbitrary decision to discount Agent Ralston's report which was unreasonable for several reasons.

First, Agent Ralston was an officer of the court who had no reason either to lie or to exaggerate what he saw. Second, what he saw was that Mr. Jones "was 'high' when he was in Court for his trial and when he accompanied me over to my office for the initial interview of this investigation," which was what Mr. Jones was trying to prove at the hearing. Third, because Agent Ralston was an experienced probation officer, there was no reason for Judge McCurdy to disbelieve that Agent Ralston had no doubt taken personal histories from hundreds of heroin-addicted defendants and was therefore familiar with the symptoms of heroin intoxication and addiction. Fourth, Agent Ralston was prudent enough to verify his observation that petitioner was intoxicated from heroin at the time of his guilty plea and during the interview by giving him an immediate urine test which was positive for opiates and by getting a reluctant Mr. Jones to admit to a lengthy history of heroin addiction, an admission which at that time Mr. Jones was reluctant to make because it appeared to him to be against his interest. Fifth, Mr. Merrick, the victim of the crime, testified against his interests that he was Mr. Jones' drug supplier and that he was therefore in a position to know the nature and extent of Mr. Jones' addiction to heroin. Sixth, in testimony which verified and explained the objective evidence that he was high when he entered his guilty plea, Mr. Jones said that he was a long-term heroin addict who injected himself with heroin that morning, both because he was addicted and to ward off the inevitable withdrawal symptoms

he would experience in anticipation that while in jail, he would no longer have regular and reliable access to heroin.

Finally, the State did not dispute either that petitioner was high from his heroin use and addiction at the time of his guilty plea or that Mr. Jones was therefore incapable of knowingly and intelligently waiving the rights explained during the guilty plea litany. Thus, all this testimony verified and explained Agent Ralston's unimpeached and reliable observations that "[Mr. Jones] was 'high' when he was in Court for his trial and when he accompanied me over to my office for the initial interview of this investigation." Therefore, the trial court's conclusion that "petitioner has not affirmatively proven that he was intoxicated at the time of his plea" was erroneous and indeed, clearly so.

Concerning the trial court's conclusion that " petitioner has not affirmatively proven that . . .assuming that he was intoxicated, that his decision to take the plea or his ability to comprehend the proceedings was affected," this finding is likewise clearly erroneous in part because it is based on the astonishing presumption that being high from heroin intoxication during a guilty plea would not affect a person's ability to comprehend the proceedings. Indeed, as both Mr. Lane's and Dr. Newton's testimony affirmatively demonstrated, such heroin intoxication would go far beyond merely affecting a person's ability to comprehend the proceedings: it would, according to Mr. Lane, at least cause "heroin addicts [to] exhibit poor judgment while under the

influence of heroin" and according to Dr. Newton, if Mr. Jones were under the influence of heroin at the time he pled guilty, he would not have been able to enter a voluntary and knowing guilty plea because his cognitive ability would at best be minimal.

Likewise, the trial court's conclusion that "[n]one of the petitioner's witnesses with the exception of himself, could testify that . . .his ability to take the plea was compromised" was clearly erroneous because among other reasons, Mr. Lane and Dr. Newton both testified to the contrary; and trial judge himself said during the hearing that day a psychiatrist could so testify. Moreover, concerning the trial court's conclusions that the presentence report "did not suggest that the Petitioner's ability to understand and take the guilty plea was compromised," only a psychiatrist or a person of Mr. Lane's or Agent Ralston's expertise could draw this conclusion - and they did! Agent Ralston put it this way:

> "Mr. Jones impressed this Agent as a man who is physically and psychologically dependent on heroin. He can not even do without drugs long enough to make a sober appearance in Court! He then attempted to lie about his condition by saying he was "drowsy" because he had taken some Tylenol that morning. He is a man who obviously possesses little self-control and whose self-concept may have deteriorated from prolonged abuse of heroin."

This statement would certainly suggest to a person of prudence and caution that "Petitioner's ability to understand and take the

guilty plea was compromised." Thus, the court's conclusion to the contrary was clearly erroneous.

Concerning the trial court's conclusion that the presentence report "reflects an intelligent discourse between the investigator and the Petitioner," the court read the report much too broadly. First, he ignores the fact that Mr. Jones lied to Agent Ralston to conceal his addiction and that Mr. Ralston saw through his lie. Second, he ignores that providing someone with historical data does not necessarily require the level of rational thinking required to understand a guilty plea litany. Thus, the conclusion to the contrary is clearly erroneous, completely arbitrary and without any basis in the record. In fact, the words chosen by the trial court were lifted from *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970), a case Mr. Jones cited in support of the opposite proposition.

Malcolm, "then eighteen years old, was convicted upon his plea of guilty to the crime of bank robbery (18 U.S.C. §2113(a)) and sentenced to a term of fifteen years on March 22, 1968." Malcolm then "moved the district court in September 1969 for vacation, correction or reduction of sentence or, in the alternative, to vacate his plea of guilty under Rule 35, Fed.R.Crim.P., and 28 U.S.C. §2255" and "[t]he motion was denied without a hearing." Malcolm then "appeal[ed] from the order of denial, asserting error in the district court's dismissal of his petition without an evidentiary hearing on his claims that: (1) he was mentally incompetent to

plead guilty because he was then addicted and under the influence of drugs . . ." 432 F.2d at 811.

The safeguards of fundamental fairness entitle Mr. Jones to vacate his guilty plea since he has demonstrated that his mental faculties were so impaired by drugs when he entered his plea that he was incapable of a full understanding and an appreciation of the charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea. *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970).

In *Malcolm*, the United States Court of Appeals for the Second Circuit said:

> These safeguards of fundamental fairness make plain that Malcolm would be entitled to vacation of his plea and conviction if he proved that his mental faculties were so impaired by drugs when he pleaded that he was incapable of full understanding and appreciation of the charges against him, of comprehending his constitutional rights and of realizing the consequences of his plea. Sanders v. United States, 373 U.S. 1, 5-6, 19-20, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963). A plea in such circumstances is not a knowing, free and rational choice of the alternatives open to an accused and cannot be an intelligent waiver of constitutional rights. It would, therefore, offend due process. Boykin v. Alabama, supra; McCarthy v. United States, supra; Sanders v. United States, supra, 373 U.S. at 19-20, 83 S. Ct. 1068; Machibroda v. United States, 368 U.S. 487, 493, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962); Kercheval v. United States, 274 U.S. 220, 223, 47 S. Ct. 582, 71 L. Ed. 1009 (1927).
>
> * * *
>
> There is nothing in the form or content of the entire interrogation to suggest that Malcolm was under the influence of drugs or otherwise not in full possession

> of his mental faculties. On the contrary, he appears to have acted with intelligence and understanding. The arraignment proceedings, thus, appear regular on their face.

Id. at 812. However, the Second Circuit observed:

> *Nevertheless, Malcolm might have been under the influence of drugs and his condition would not necessarily be revealed by the record or be apparent to the judge who sees him only briefly. Regularity of the arraignment, therefore, cannot "conclusively show" that Malcolm's present claim is without merit, for the facts upon which such a claim is based are usually outside the record. Sanders v. United States, supra, 373 U.S. at 19-20, 83 S. Ct. 1068. Here, however, there is more to the record than the mere transcript of the arraignment.'* (Emphasis added)

Id. at 813.

Significantly, the Second Circuit based its determination that Malcolm had not pled guilty while under the influence of drugs on the fact that the presentence report 'conclusively refute[d] Malcolm's claim.' The court said:

> The presentence report, part of the files and records upon which the court below relied both in imposing sentence and in denying Malcolm's application for collateral relief, conclusively refutes Malcolm's claim. That report shows that Malcolm was interviewed on January 25, 1968 immediately following his plea. He informed the probation officer that he had started using heroin about four months earlier, in September 1967, that he had gone to a Dr. Samuel Grubin for help in stopping his habit, and that he "had not taken a shot" in about three weeks. He also gave a detailed and coherent statement, in writing, admitting his crime from the planning to the division of the stolen money.

> Later, but before sentence, he produced a letter from Samuel Grubin, M.D., dated January 27, 1968 (two days after his plea), certifying that he "has been examined by me and found to be in good physical condition and free from any addiction.
>
> Thus, the files and records conclusively show that immediately following his plea Malcolm admitted his guilt, denied the recent use of drugs, and confirmed his freedom from narcotics by certification of his own physician. In light of these immutable facts, there was no error in denying collateral relief on this claim without a hearing for, as Judge Abruzzo found, the files and records of the district court "conclusively show" that it is without merit.

Id.

Obviously, the Second Circuit would have reached a different conclusion had the presentence report contained facts similar to those in the presentence report in the instant case.

Mr. Jones is entitled to relief based on the trial court's erroneous conclusions of law and fact since he has shown that his guilty plea was involuntarily and unknowingly taken in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

CONCLUSION

For the reasons cited above, Petitioner prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of Ware or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

IN THE COURT OF APPEALS
OF MARYLAND

September Term 1997

Appeal No. 585

ROBERT JONES
Appellant,

v.

STATE OF MARYLAND

Appellees.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the answer, and conditional cross-petition filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and condition cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert Bell
Chief Judge

[Filed June 11, 1997]

APPENDIX C

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 585

ROBERT DONNELL JONES

Appellants,

vs.

STATE OF MARYLAND

Appellees.

OPINION

[Filed March 26, 1997]

GETTY, J.

This coram nobis case presents issues relating to whether a circuit court judge may authorize a belated appeal from the denial of a petition for a writ of error coram nobis, and whether the chancellor erred in denying the petition for coram nobis relief.

The underlying facts and statutory background are as follows: In 1975, before Judge Basil A. Thomas in the Circuit Court for Baltimore City, Robert Donnell Jones, appellant herein, entered a plea of guilty to the crime of assault with

intent to murder. On July 31, 1975, he was sentenced to five years imprisonment.

On October 15, 1992, appellant filed a petition for writ of error coram nobis, seeking to have the 1975 conviction vacated. The basis for the petition was appellant's allegation that his guilty plea in 1975 was involuntary because he was under the influence of heroin at the time he entered his plea.[1]

Appellant's petition for writ of error coram nobis to set aside the 1975 conviction was filed on October 15, 1992, and denied by the circuit court without a hearing on October 19, 1992.[2] Thereafter, appellant filed a second coram nobis petition on October 21, 1993, which was heard by the court and denied by Judge Joseph P. McCurdy in a written opinion dated March 3, 1994.

Although appellant alleges that he instructed his counsel to appeal Judge McCurdy's order of March 3, 1994, no notice of appeal was recorded by the court clerk. The State, however, received a copy of a notice of appeal. Nearly two years later, Judge McCurdy, on January 16, 1996, granted a belated appeal, citing the failure of appellant's counsel to file the appeal, or the failure of the clerk of court to record the appeal.

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[1]Appellant's present incarceration is based, in part, on the 1975 conviction. We assume that the earlier conviction served as a predicate offense for the term he is presently serving.

[2]The basis of the denial, prior to the State's response to the petition, was that appellant waived his right to file a coram nobis petition by failing to seek post conviction relief prior to the expiration of his sentence.

The receipt of a copy of the appeal by the State was cited by the court as evidence that appellant was deprived of his right of appeal through no fault of his own.

We shall address first whether a circuit court judge may authorize a belated appeal from the denial of a petition for writ of error coram nobis.

Before launching a discussion of the granting of a belated appeal, a brief reference to the nature of the writ is meaningful in that coram nobis has limited use as a present day post-conviction remedy. There are no statutes or rules of court governing its use. The demise of coram nobis is primarily attributable to the adoption of the Post Conviction Procedure Act in 1958, ch. 44 of the Acts of 1950, Md. Code Art. 27, § 645A, et *seq*.

The purpose of the Post Conviction Procedure Act was to create a simple statutory procedure in place of the common law habeas corpus and coram nobis remedies for collateral attacks upon criminal convictions and sentences. Coram nobis may be pursued only where no other statutory proceeding is available. Thus, the vast majority of collateral attacks upon convictions are filed under the Post Conviction Procedure Act whereby, in a first petition, a convicted defendant is entitled to a hearing on the merits, the assignment of counsel, and a right of appeal.

Coram nobis is defined in *Bernard v. State*, 193 Md. 1, 3-4 (1949), as follows:

> The purpose of the writ of error coram nobis, which is an old common-law writ recognized in this State, is to bring before the court a judgment previously rendered by it for the purpose of modification on account of some error of fact which affected the validity and regularity of the proceedings, and which was not brought into issue at the trial of the case...The writ will lie to set aside a judgment...where a plea of guilty was procured by force, violence, or intimidation, or where at the time of the trial the defendant was insane, when such facts were not known to the trial court when the judgment was entered,....

The function of a coram nobis writ is different from that of an ordinary writ of error in two respects. First, it deals only with facts which, if known at the time the judgment was rendered, would have precluded its rendition; whereas, an ordinary writ of error deals with questions of law. Second, coram nobis is addressed to the court which rendered the judgment, while a writ of error is addressed to a superior court. *See Keane v. State*, 164 Md. 685, 691 (1933).

Appellant contends that Judge McCurdy had the power to grant a belated appeal in this case because the relevant part of the Post Conviction Statute, art. 27, § 645 (e), does not bar the use of the writ as is alleged by the State.

The statute provides, in part:

> No appeals to the Court of Appeals or the Court of Special Appeals in habeas corpus or coram nobis cases, or from other common-law statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except appeals in such cases pending in the Court of Appeals on June 1, 1958, shall be processed in due course.

According to appellant, the Post Conviction Procedure Act, by its express terms, does not provide a remedy for persons who have been convicted of crimes and whose sentences have expired, and who are no longer on parole or on probation. Since appellant is no longer in any of those categories, he contends that he is challenging his underlying conviction, not his sentence. For that purpose, he argues, the writ of coram nobis is alive and well.

The State, conversely, urges that the purpose of the legislature in enacting Art. 27, § 645 (e), was to consolidate into one statutory procedure all of the remedies previously available for collaterally attacking the validity of a criminal conviction or sentence. The statute, the State asserts, unequivocally says that no appeals are permitted in coram nobis cases.

Appellant relies on language in *Fairbanks v. State*, 331 Md. 482 (1993), as being supportive of his right to proceed under coram nobis. That opinion, authored by Judge McAuliffe, involved sentencing under a recidivist statute. The defendant contended that his enhanced sentence was predicated upon an offense not shown to be free of constitutional infirmity, because there was no showing that he intelligently waived his right to a jury trial, although he was represented by counsel at that time. The Court held that there is no constitutional right to mount a collateral attack against a facially valid predicate conviction at the sentencing hearing where it is offered. Convictions obtained while an accused is represented

by counsel, furthermore, are presumptively valid and the burden is on the accused to prove otherwise. *Id.* at 490.

In footnote 3, the Court noted that a defendant may or may not be able to bring a collateral attack. Citing *McMannis v. State*, 311 Md. 534, 539-47 (1988), the Court pointed out that post conviction and habeas corpus remedies are available only when a defendant is incarcerated, or subject to conditions of parole or probation. The Court added: "The writ of error coram nobis, addressed to the court that entered judgment, may be available to the defendant who is no longer in custody. Moreover, a defendant able to mount a collateral challenge may be barred by waiver,... or might be barred by [aches, ..." 331 Md. at 492 n.3 (citations omitted).

In *Gluckstern v. Sutton*, 319 Md. 634, 662, cert. denied, 498 U.S. 950 (1990), a habeas corpus case involving whether an appeal is available to a petitioner, the Court (Eldridge, J.) described the Post Conviction Procedure Act as follows:

> [T]he Act was designed to create a statutory remedy for collateral challenges to criminal judgments on Art. 31B examination and defective delinquency proceedings, and to substitute this remedy for habeas corpus and coram nobis actions challenging criminal judgments and Art. 31B proceedings.

The General Assembly in 1965 added new language to the portion of the Post Conviction Procedure Act relating to appeals in habeas corpus cases. Art. 27, 442 of the Acts of 1965 now reads: § 645(e), as amended by Ch.

No appeals to the Court of Appeals or the Court of Special Appeals in habeas corpus or coram nobis cases, or from other common-law or statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except appeals in such cases pending in the Court of Appeals on June 1, 1958, shall be processed in due course. Provided, however, that nothing in this subtitle shall operate to bar an appeal to the Court of Special Appeals (1) in a habeas corpus proceeding instituted under § 2-210 of Article 41 of this Code or (2) in any other proceeding in which a writ of habeas corpus is sought for any purpose other than to challenge the legality of a conviction of a crime or sentence of death or imprisonment therefor, including confinement as a result of a proceeding under Article 31B of this code.

The 1965 addition to the statute clearly modified the earlier language, which seemingly precluded appeals, at least in habeas corpus cases filed after June 1, 1958. The Court in *Gluckstern* held that the 1965 language authorized appeals in cases other than those challenging the legality of a conviction of a crime or sentence of death or imprisonment therefor. The discussion of intent of the General Assembly in habeas corpus cases, however, does not resolve the issue of viability or survival of coram nobis. The General Assembly could not bar habeas corpus petitions, which are provided for in Article 4, Section 6 of the Maryland Constitution. The right of appeal in habeas corpus proceedings can and has been limited without

offending the Constitution. The common law writ of error coram nobis does not share the constitutional protection accorded habeas corpus. The question remains whether the right of appeal in coram nobis actions survived the adoption of Art. 27, § 645(e), as amended in 1965. We hold that it does.

As we have stated herein, the Post Conviction Procedure Act was intended to replace habeas corpus and coram nobis as a statutory remedy for collateral challenges to criminal judgments. For the majority of cases it has succeeded. In those cases where the Post Conviction Act does not provide a remedy, however, the enactment of the new statute provided no reason for restricting appeals in habeas corpus cases. *Gluckstern*, 319 Md. at 662. The same reasoning should be applied to coram nobis. The writ of error coram nobis remains available, therefore, as a remedy to mount a collateral attach upon a prior conviction or sentence. We see no justifiable reason for denying a right of appeal in a coram nobis petition when the right of appeal is available to those seeking redress under habeas corpus. The right of further review ought not depend upon the name of the vehicle bringing one to the tribunal. The paucity of coram nobis petitions, moreover, will not unduly burden the appellate courts.

We perceive no error in the chancellor granting a belated appeal from his Order denying appellate coram nobis relief. See *DOD v. Cook*, 340 U.S. 206, 71 S. Ct. 262, 95 L. Ed. 215 (1951), where the Supreme Court said that a judge "has

power in a habeas corpus proceeding to dispose of the matter as law and justice require. Accord: *Beard v. Warden*, 211 Md. 658, 661 (1957), stating that a circuit court in a habeas corpus proceeding could order that a prisoner be granted a belated appeal from his original criminal conviction.

Denial of Relief

A facially valid conviction is entitled to a strong presumption of regularity and, accordingly, the burden of proving otherwise is on the defendant attacking the conviction. *Fairbanks*, supra, at 487. Appellant has not provided the transcripts if the proceeding in 1975. Md. Rule 8-411, 8-413, 8-501(a). We conclude, in absence of any evidence to the contrary, that the record from the 1975 trial would establish that the court conducted a hearing to establish that the guilty plea was intelligently and voluntarily entered.

In *Reane v. State*, 164 Md. 685 (1933), the Court ruled that the writ of coram nobis will not lie to contradict or place in issue any fact that has been already adjudicated even if wrongly decided. Clearly, the ability of appellant to understand and voluntarily enter a guilty plea was a fact issue that was decided by the court in 1975. Accord: *Bernard, supra.*

Judge McCurdy filed a Memorandum and Order denying the relief sought by appellant. He reviewed the testimony of appellant's witnesses and concluded that none of the witnesses except appellant could testify that appellant was under the influence of heroin, or that his ability "to understand and take

the guilty plea was compromised." Additionally, the court reviewed the presentence investigation report, which included some evidence of appellant's drug use at the time of trial. The court found that the report "reflects an intelligent discourse between the investigatory ad the petitioner.' The trial judge had the opportunity to judge the credibility of the witnesses and to assess the probative value of their testimony. He concluded that appellant had the burden of establishing that his guilty plea in 1975 was not knowingly and voluntarily entered, and that appellant failed to establish that fact by a fair preponderance of the evidence. Based upon our review of the record, we cannot say that the conclusions reached by the chancellor are clearly erroneous, if they are erroneous at all.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY APPELLANT.

APPENDIX D

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No. 67599775

ROBERT DONNELL JONES
[Petitioner]

vs.

STATE OF MARYLAND

ORDER

The Petitioner, Robert Donnell Jones, now comes with his second Petition for Coram Nobis Relief. The Petitioner is requesting that this court vacate the conviction and sentence entered against him on July 31, 1975 and September 4, 1979. On July 31, the Petitioner pled guilty to one count of assault with intent to murder before Judge Basil A. Thomas in the Criminal Court of Baltimore City. Judge Basil sentenced the Petitioner to five y ears in the Department of Corrections. The sentence has since expired. The Petitioner filed his first petition on October 15, 1992 where it was denied by Judge Edward Angeletti.

This Court, on the Petitioner's second Coram Nobis filed October 21, 1993, held hearings on December 20, 1993, February 15, 16, 17, 1994. The Petitioner presented the

testimony of Richard H. Lane, Executive Director of Man Alive, a drug treatment program. Mr. Lane was qualified as an expert on how addicts interact with other persons while the addicts are under the influence of heroin. Mr. Lane testified as to his own history of heroin use and to the manipulative behavior of heroin addicts. He also testified that he could when an addict was able to reflect on questions before answering rather than giving a simple 'yes' or 'no' response. Mr. Lane was never involved in the treatment of the Petitioner, and had no knowledge of the Petitioner's guilty plea in question here.

Petitioner then presented the testimony of Thomas Merrick, the victim in the case in which Petitioner pled guilty. Mr. Merrick testified as to the practice of his use of heroin with Petitioner, and that the Petitioner has a high tolerance for heroin. Mr. Merrick was present in the Court on the day that the Petitioner's plea, and he could not tell whether Petitioner was under the influence at the time of his plea.

The Petitioner and the State introduced the Pre Sentence Investigation prepared for the sentencing after the guilty plea. The investigator John J. Ralston observed that the Defendant was "high" when he was in court for his trial and when he accompanied the interviewer to the interview. The Petitioner also tested positive for opiate at the time.

The Petitioner presented the testimony of Patricia A. Newton, M.D., M.P.H., M.A. Dr. Newton was qualified expert in the treatment of heroin addiction. Dr. Newton met

the Petitioner when he was admitted to the North Charles General Hospital. That admission was not related to the facts surrounding the guilty plea at issue here, but Dr. Newton did testify that the Petitioner on that occasion reported heroin addiction since the 1970's, and her partial records indicated that the Petitioner was heavily under the influence and exhibiting withdrawal symptoms. The Petitioner's attorney posed a hypothetical question to Dr. Newton inquiring as to the capacity to plead guilty of an individual who regularly ingested six to twelve bags of heroin per day, was physically and psychologically depended on heroin, has been addicted for five to seven years, had come to court to stand trial for assault with intent to murder as a result of a dispute related to his addiction, and "shot up" fifteen minutes before he pled guilty to that charge. Dr. Newton responded that in her opinion he could not have a high degree of cognitive clarity. His cognitive abililty would be a best minimal and would become more clouded within the hour. She stated that the initial effect of the drugs could not be demonstrable, but within a half hour the individual would become drowsy, then difficult to arouse, then comatose. Dr. Newton also stated that addicts can mask their symptoms and avoid detection of this drug use by giving short answers to questions.

The Petitioner himself testified that at the time of his guilty plea he was using ten bags of heroin per day or more if he had it, and that he used heroin in the rest room after he arrived at the court house. Defendant stated that he did not want to plead

guilty but that his attorney told him that it was the best deal he could get. The Petitioner was continued on bail after the plea was taken, pending the Pre Sentence Investigation and disposition.

In a Coram Nobis proceeding and similar such petitions, the petitioner has the burden of proving by a preponderance of the evidence the impropriety of the trial proceedings, here, the validity of the guilty plea. The standard for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the courses of action open to the defendant, *Kisamore v. State* 286 Md. 654 (1980). While this is of vital importance to the propriety of the trial proceedings, the petitioner has not affirmatively proven that he was intoxicated at the time of his plea or, assuming that he was intoxicated, that his decision to take the plea or his ability to comprehend the proceedings was affected. None of the petitioner's witnesses with the exception of himself, could testify that the petitioner himself was under the influence of heroin or that his ability to take the plea was compromised. The only objective evidence to suggest the petitioner's drug use at the time of the plea was the Pre Sentence Investigation report. This report however did not suggest that the Petitioner's ability to understand and take the guilty pleas was compromised. The only objective evidence to suggest the petitioner's drug use at the time of the plea was the Pre Sentence Investigation report. This report however did not suggest that the Petitioner's ability to understand and take the

guilty pleas was compromised. In fact the report reflects an intelligent discourse between the investigator and the Petitioner. Mr. Lane and Dr. Newton's testimony are only speculative at best as to the impact of the Petitioner's intoxication.

Therefore, the Petition for Coram Nobis relief this 3rd day of March, 1994 be DENIED.

Joseph P. McCurdy, Judge

*See generally Ramsey v. State 767 S.W. 2d 572 (Mo. App 1988). Petitioner must allege particular facts showing his right to relief. No coram nobis relief could be granted if the movant knew or through reasonable diligence should have known of the facts at the time of the original proceedings.